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GreenbergGlusker

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Via Federal Express

Mr. Jim Rains
California Department of Food and Agriculture
1220 N, Street Room A-316
Sacramento, CA 95814

Re: ***Notice of Intent to Adopt a Negative Declaration for the Amendments to the California Department of Food and Agriculture Milk Stabilization Plan***

Dear Mr. Rains:

We comment on behalf of the Dairy Institute of California ("Dairy Institute"). The Dairy Institute appreciates the opportunity to provide comments in response to the California Department of Food and Agriculture's (the "CDFA") Notice of Intent to adopt a Negative Declaration for the Amendments to the California Department of Food and Agriculture Milk Stabilization Plan (the "Amendments").

We agree with the CDFA's conclusion in its California Environmental Quality Act ("CEQA") Initial Study of the Amendments (the "Initial Study") that the preparation of an environmental impact report is not required, warranted, or appropriate at this time. p. 28.[1] We also agree with the CDFA's conclusion that "any possible linkages between [the Amendments] and adverse environmental impacts due to enhancements in production are indirect, tenuous and speculative." p. 1. However, we believe that the CDFA should not have even prepared the Initial Study because the Amendments do not constitute a "project" under CEQA and are therefore not subject to CEQA.

As we set forth in our June 12, 2006 post hearing-brief to Mr. David Ikari, the Amendments are not a project because the Amendments are not a necessary step leading to any environmental impact.

[1] All page references are to the Initial Study, unless otherwise noted.

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California Public Resources Code § 21065 defines a "project" as an activity which may cause either a direct or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: "(1) an activity directly undertaken by any public agency, (2) an activity undertaken by a person which is supported, in whole or in part, through contacts, grants, subsidies, loans or other forms of assistance from one or more public agencies, and (3) an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

For an agency activity to be considered a CEQA project, some causal connection must exist between the activity and a direct or a reasonably foreseeable indirect physical change in the environment. CEQA cannot be construed so as to make every agency activity a project, because such "a construction would invoke the expensive and time-consuming procedures required to complete at least a negative declaration in respect to virtually every action of a public agency." *See Simi Valley Recreation and Park District v. Local Agency Formation Commission*, 51 Cal.App.3d 648, 663 (1975); *accord City of Agoura Hills v. Local Agency Formation Commission*, 198 Cal.App.3d 480 (1988).

The California Supreme Court has emphasized that for an agency activity to be a CEQA project, it must be an "essential step leading to an ultimate environmental impact." *Fullerton Joint Union High School District v. State Bd. of Educ.*, 32 Cal.3d 779, 797 (1982); *see also Kaufman & Broad-South Bay, Inc. v. Morgan Hills Unified School District*, 9 Cal.App.4th 464 (1992) (school district's formation of a community facilities district to raise revenue was not a CEQA project because there was no "causal link" between the formation of the community facilities district and the alleged environmental impact of a new school).

In other words, the agency activity must be "a necessary step in a chain of events which would culminate in a physical impact on the environment" to be considered a project. *Kaufman*, 9 Cal.App.4th at 473. Mere "speculation" about resulting impacts from an agency activity are insufficient to render the activity a CEQA project. *Id.* at 476 (discounting the assertion that the school district would be more likely to build new schools because of the funding district as "nothing more than speculation about a future policy decision.").

Here, the Amendments are not a "necessary step" leading to the construction or expansion of milk processing plants. As the CDFA has recognized in its Initial Study, any contention that the milk processors are going to construct new milk processing plants because of the Amendments is mere speculation. The Amendments do not commit the milk processors to a "definite course of action" to expand or construct new dairies. *See Kaufman*, 9 Cal.App.4th at 476 (finding that the establishment of a funding district is not a CEQA project because it does not commit the school district to any definite course of action).

The CDFA's own findings in the Initial Study support the conclusion that the Amendments are not a CEQA project and that no CEQA review should have been undertaken.

As the CDFA aptly recognized throughout its Initial Study, many factors contribute to making any "projections inherently speculative." p. 10. These multitude of factors and their variable magnitudes make "reliable prediction of specific or individual actions impossible." pp. 11-12. Thus, we agree that "it is pure speculation whether and what, if any, direct or indirect environmental effects will reasonably, foreseeably result from the proposed adjustments in the milk pricing formulae." p. 28.

We also agree with the CDFA's finding that the "proposed milk pricing changes are not a necessary first step, or even necessarily a step, in increased milk production or processing." p. 25 (emphasis in the original). For that reason, under *Fullerton* and its progeny, a CEQA review should not have been undertaken. Given that the Amendments are not a "necessary step" or even a "step" toward increased milk production or processing, it would be impossible for the CDFA to conduct any analysis of the impacts of the Amendments, let alone a proper CEQA analysis.

In contrast to the present situation, in cases in which a court has found that an agency adoption of a standard is a CEQA project, the agency activity has been a necessary step in leading to a potential environmental impact. For instance, in *Plastic Pipe and Fittings Ass'n v. California Bldg Standards*, 124 Cal.App.4th 1390 (2004), the court found that the commission's adoption of a code provision allowing the use of PEX plastic pipes was a CEQA project. However, in *Plastic Pipes*, the environmental impact of concern, the use of potential dangerous PEX pipes, directly depended upon the adoption of the code provision permitting the use of the pipes. In other words, without the adoption of the code provision, the PEX pipes could not be used and the potential environmental impact could not occur.

Based on the foregoing, we believe that the CDFA erred in its initial determination that the Amendments are a project subject to CEQA review. The CDFA's determination that any assessment of the potential environmental impacts is "speculative" and "impossible" establishes that the Amendments are not a CEQA project. However, should the CDFA maintain that the Amendments were a project, we agree with the CDFA's decision to adopt a negative declaration.

If any clarifications are needed regarding the issues raised in this letter, please contact me.

Very truly yours,

David E. Cranston

SLB/

cc: Rachel Kaldor
William Schiek